INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN R. PARK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit in the above-captioned case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–12A) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 13A) was entered on July 2, 1974. On July 26, 1974, Mr. Chief Justice Burger extended the time within which to file a petition for a writ of certiorari to and including August 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution of a corporate officer for doing or causing acts resulting in the adulteration of food, an instruction that the jury may convict if it finds that the defendant had a responsible relation to the situation, but which does not also require a finding of particular acts of omission or commission or gross negligence by the officer, accords with the standards of *United States* v. *Dotterweich*, 320 U.S. 277.

2. Whether evidence that the president of a supermarket chain was on notice of insanitary conditions in his firm's Philadelphia warehouse in March 1970, was admissible to rebut his defense of justifiable reliance on subordinates, or to show his failure adequately to supervise them, with respect to insanitary conditions in the chain's Baltimore warehouse in 1971 and 1972.

STATUTE INVOLVED

Section 301(k) of the Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1042, as amended, 21 U.S.C. 331(k), provides:

> The following acts and the causing thereof are prohibited:
>
> * * * * *
>
> (k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

STATEMENT

In a five-count information filed in the United States District Court for the District of Maryland, the United States charged Acme Market, Inc., a large food store chain, and respondent, its president, with violating Section 301(k) of the Food, Drug, and Cosmetic Act, *supra*, p. 2. The information alleged that the defendants had received food that had been shipped in interstate commerce and held for sale in Acme's Baltimore warehouse following the interstate shipment, and that, because Acme's Baltimore warehouse was infested by rodents, the defendants had caused the food to be adulterated by being exposed to contamination by rodents.[1]

Each count of the information charged that the food was adulterated because it consisted in part of a filthy substance and was rodent-gnawed (see 21 U.S.C. 342 (a)(3)) and because the food was held under insanitary warehouse conditions whereby it may have become contaminated (see 21 U.S.C. 342(a)(4)).

Acme entered a plea of guilty to each count of the information. On May 10, 1973, after a jury trial, respondent was found guilty on all five counts of the information, and was subsequently sentenced to pay a total fine of $250.

1. At trial, the government introduced evidence establishing that the adulterated food had been

[1] Acme is a nationwide food store chain that employs approximately 36,000 persons and does business through 874 retail outlets. The company has twelve main warehouses and four special warehouses located in various parts of the country. The company headquarters, including respondent's office, is located in Philadelphia, Pennsylvania (App. A, *infra*, p. 5A, n. 5).

shipped in interstate commerce and was being held for sale in the Baltimore warehouse. An inspector from the Food and Drug Administration testified that he inspected this warehouse in November and December 1971 and found extensive evidence of rodent infestation (J.A. 20–22).[2] Following this inspection, FDA sent respondent a letter advising him of the conditions at the Baltimore warehouse (J.A. 30, Exh. 23). Robert W. McCahan, Baltimore Divisional Vice-President, responded to the letter on behalf of respondent (J.A. 32, Exh. 24). A second inspection by FDA in March 1972 revealed further evidence of rodent infestation (J.A. 22–23). The first four counts of the information (App. A, *infra*, p. 2A) described violations discovered during the inspection in November and December 1971, while the fifth count described violations discovered during the inspection in March 1972 (*ibid.*).

McCahan testified that he replied to the FDA letter on behalf of respondent (J.A. 35). Acme's general counsel identified respondent as the president and chief executive officer of Acme and read the company bylaws describing respondent's duties. The bylaws provide that the chief executive officer "shall, subject to the board of directors, have general and active supervision of the affairs, business, offices and employees of the company" (J.A. 40).

Respondent was the only defense witness. He testified that, while all company employees were under his direction, he employed a system of delegated respon-

[2] "J.A." refers to the Joint Appendix filed in the court of appeals.

sibilities under which he had delegated the responsibility for dealing with sanitation problems to various other persons within the corporation (J.A. 43–46). He admitted that he had seen the letter sent to him by FDA following the first inspection, advising him of the conditions at the Baltimore warehouse, but stated that he had delegated the responsibility of investigating the situation to McCahan (J.A. 46–48).

On cross-examination, respondent admitted that he had received and read a letter from FDA dated April 24, 1970 (J.A. 53–55). This letter (Exh. 27) stated that evidence of rodent infestation had been found in Acme's Philadelphia Warehouse.[3] Respondent acknowledged that, with the exception of the divisional vice-president, the same corporate officials have responsibility for sanitation in both Baltimore and Philadelphia (J.A. 55–56). He also conceded that sanitation problems occurred in Philadelphia and then again in Baltimore, that these incidents indicated that his system for handling sanitation matters was not working perfectly, and that he had the ultimate responsibility to make whatever changes were necessary to make the system work (J.A. 56–57).

The district court instructed the jury on the issue of respondent's responsibility as follows (J.A. 64):

> The statute makes individuals, as well as corporations, liable for violations. An individual is liable if it is clear, beyond a reasonable doubt, that the elements of the adulteration of the food as to travel in interstate commerce are present.

[3] Respondent objected to all questions concerning the Philadelphia incident.

> As I have instructed you in this case, they are, and that the individual had a responsible relation to the situation, even though he may not have participated personally.
>
> The individual is or could be liable under the statute, even if he did not consciously do wrong. However, the fact that the Defendant is president[4] and is a chief executive officer of the Acme Markets does not require a finding of guilt. Though, he need not have personally participated in the situation, he must have had a responsible relationship to the issue. The issue is, in this case, whether the Defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose.

Respondent objected to this instruction on the ground that it was not consistent with this Court's decision in *United States* v. *Dotterweich*, 320 U.S. 277 (J.A. 64–65). The jury returned a verdict of guilty on all five counts of the information (J.A. 2).

2. A divided panel of the court of appeals reversed the judgment of conviction and remanded the case for a new trial. The majority held that the jury instruction "might well have left the jury with the erroneous impression that Park could be found guilty in the absence of 'wrongful action' on his part" (App. A, *infra*, p. 5A). The court stated that the requisite "wrongful action" could consist of respondent's "gross negligence and inattention in discharging his corpor-

[4] Although the transcript says "present," the court obviously meant, and presumably said, "president."

ate duties and obligations or any of a host of other acts of commission or omission which would 'cause' the contamination of the food" (*id.* at 6A), but that respondent could not be found guilty simply because of "his relation to the corporation" as its president (*id.* at 5A).

The court also held that testimony concerning the Philadelphia incident should have been excluded as being unduly prejudicial (*id.* at 8A), although the court nevertheless suggested that the testimony might be admissible at retrial depending upon "the prosecution's new approach to the presentation of its case" (*id.* at 9A) and the district court's application of the standards for admission of evidence of prior offenses set forth in the court's recent decision in *United States* v. *Woods*, 484 F. 2d 127, 134 (C.A. 4) (App. A, *infra* pp. 7A–8A).

Judge Craven dissented on the ground that the majority opinion was inconsistent with *United States* v. *Dotterweich, supra.* He concluded that the government had presented sufficient evidence to send the case to the jury and that the jury was properly instructed. He also noted that the government had not argued to the jury that it could find the defendant guilty simply because he is the head of the company (App. A, *infra,* pp. 9A–12A).

REASONS FOR GRANTING THE WRIT

In *United States* v. *Dotterweich,* 320 U.S. 277, this court held that individual corporate officers and employees, as well as corporations, may be convicted for doing or causing the acts prohibited in Section 301 of

the Federal Food, Drug and Cosmetic Act of 1938 (52 Stat. 1042, as amended, 21 U.S.C. 331). In that decision, the Court also construed the standard of responsibility laid down by Congress for the officers and agents through whom corporations handling food and drugs must act: a person standing "in responsible relation" to the prohibited acts may be criminally liable for their occurrence even though he is not aware of the wrongdoing. 320 U.S. at 281.

Thus, officials of business entities whose activities affect the public health have been subjected to one of the highest standards of public accountability. This standard, unchanged by Congress, has protected the public for more than 30 years since *Dotterweich*. The decision of the court of appeals in this case, however, has lowered the level of accountability defined in *Dotterweich* by adding a new element—a requirement of a finding that the responsible corporate official also be guilty of gross negligence or other particular acts of omission or commission causing the violation (App. A, *infra*, p. 6A). This ruling conflicts with *Dotterweich* and decisions of other courts applying *Dotterweich*. Moreover, it defeats the purpose of Congress in enacting Section 301 by inviting corporate executives to insulate themselves from active supervision of matters vitally affecting the public health, and by diffusing responsibility for such matters.

1. Despite this Court's warning in *Dotterweich* that, in construing Section 301, "[l]iteralism and evisceration are equally to be avoided" (320 U.S. at 284), the court of appeals gave an unduly rigid reading to Section 301(k), the provision involved here. That section

prohibits the "doing" or the "causing" of any "act with respect to, a food, * * * if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated * * *." The court of appeals concluded that liability under this statute requires proof of some "wrongful" act.

Dotterweich is to the contrary. That case involved prosecution under Section 301(a) of a drug jobbing corporation, and its president and general manager, Dotterweich, for shipping misbranded drugs in interstate commerce. A jury failed to agree as to the corporation, but nevertheless convicted Dotterweich as the responsible corporate officer even though he had no personal knowledge of the misconduct involved, and there was no evidence of any "personal guilt" on his part. 320 U.S. at 286 (Murphy, J. dissenting). The court of appeals set aside the conviction on the ground that only the corporation could be convicted for the offense charged. In reinstating the conviction, this Court defined standards of corporate and individual responsibility imposed by Section 301 which are now regarded as fundamental in the food and drug industries.

The Court held, first, that the statute "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States* v. *Balint*, 258 U.S. 250." 320 U.S. at 281.

Second, it rejected a reading of the statute based upon fears that it "might" operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment" (*id.* at 284). As the Court stated (*ibid.*):

> To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid or abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. * * *

Third, the Court recognized the practical consequences of the high standard it was adopting, and found support for it in the balance struck by Congress between the relative situations of the corporate official in a position to learn of problems in the business he is running, and that of consumers who might innocently suffer grave injuries to their health (*id.* at 284–285):

> Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least

> the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

The decision in *Dotterweich* thus rested on Congress' clear purpose to impose upon corporate officers with supervisory responsibilities an affirmative duty to assure that food and drugs are not adulterated or misbranded. The Court eschewed any attempt to define or clarify "the variety of conduct whereby persons may responsibly contribute in furthering a [violation of the Act]." *Id.* at 285. Rather, it held that "[i]n such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted." *Ibid.* The question of individual responsibility, therefore, is properly a matter for the jury in the light of its assessment of evidence showing the individual defendant's duties within his firm.

These criteria have been followed in numerous cases. For example, in *H. B. Gregory Co.* v. *United States*, No. 73–1744 (C.A. 7), decided March 14, 1974, pending on petition for a writ of certiorari, No. 74–142, the Court of Appeals for the Seventh Circuit expressly rejected a contention that the strict personal liability recognized in *Dotterweich* was an improper legal standard because it "fails to require a causal relation between the individual and the violation of the Act." Slip op. p. 8. See also *United States* v. *Shapiro*, 491 F. 2d 335, 337 (C.A. 6); *United States* v. *Cassaro, Inc.*, 443 F. 2d 153, 157 (C.A. 1); *Lelles* v. *United States*, 241 F. 2d 21, 22–25 (C.A. 9), certiorari

denied, 353 U.S. 974; *United States* v. *Kaadt*, 171 F. 2d 600, 604 (C.A. 7); *United States* v. *Parfait Powder Puff Co.*, 163 F. 2d 1008 (C.A. 7), certiorari denied, 332 U.S. 851; *United States* v. *Diamond State Poultry Co.*, 125 F. Supp. 617, 619, 620 (D. Del.).

Moreover, the principles of *Dotterweich* that are controlling here have been reiterated and reaffirmed by this Court in *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91, and *United States* v. *Freed*, 401 U.S. 601, 609.

The court below purported to distinguish *Dotterweich* on two grounds. First, it emphasized the size of the supermarket chain of which respondent was president and chief executive officer (see p. 3, *supra*, n. 1). But nothing in *Dotterweich* indicates that a corporation's size is an exculpatory factor; the test of constructive participation is official responsibility, whether the corporation be large or small. Assessment of that responsibility, in the light of such facts as the corporation's size and other defensive matters raised at trial, is a matter for the jury under proper intructions. See *United States* v. *Wiesenfeld Warehouse Co.*, *supra*.

Second, the court of appeals relied upon a sentence in *Dotterweich* suggesting that all who aid and abet a corporation in commission of an offense are equally guilty. 320 U.S. at 284. Read in context, however, that language was intended simply to emphasize the concept of individual responsibility, not to restrict the independent offense, so carefully defined in Section 301, to prosecutions for aiding, abetting or con-

spiring with the corporation.[5] This is shown by the fact that it was not fatal to the validity of the officer's conviction in *Dotterweich* that the jury had disagreed as to the guilt of the corporation.

The jury instructions upheld by this Court in *Dotterweich* (320 U.S. at 285) show that proof of a wrongful act by a corporate official is not necessary to establish his liability under Section 301.[6] These instructions did not require the jury to find "wrongful action," but simply to determine responsibility. Similarly, the charge in the instant case instructed the jury to determine whether respondent "had a position of authority and responsibility in the situation out of which these charges arose" (Statement, *supra*, p. 6).

As Judge Craven recognized in his dissent, the government has never argued that respondent is guilty of

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[5] 18 U.S.C. 2(a) provides:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

[6] The district court in the *Dotterweich* case instructed the jury as follows:

"We also have as a defendant here, Joseph Dotterweich. As far as the question of his guilt regarding the charges in the information is concerned, the question is, if you find the product to be misbranded and adulterated, 'Was he responsible for the shipment of them in interstate commerce?' In other words, are you satisfied from the evidence that the shipment of the cascara compound and the shipment of the digitalis were made under his supervision by him as 'General Manager.' It is not necessary for the Government to prove that he personally and physically made the shipment himself. It is sufficient if the evidence establishes to your satisfaction that it was made under authority conferred by him as general manager upon his subordinates, including the receiving and shipping clerk." (Record on Appeal in *United States* v. *Joseph H. Dotterweich* at 164.) See also *United States* v. *Kaadt*, *supra*, 171 F. 2d at 604.

violating Section 301 solely because he is president of the corporation. As the trial judge noted in his instructions (Statement, *supra*, p. 6) corporate titles do not necessarily prove responsibility for the situations resulting in violation of the Act. Rather, the government must offer proof of actual supervisory responsibility relating to the prohibited acts. It did so in this case, and it was, accordingly, for the jury to determine, in the light of that proof and respondent's exculpatory evidence, whether he was in fact responsible.[7] The decision of the court below to the contrary would substantially curtail the effectiveness of both (1) the government's enforcement program under the Food, Drug and Cosmetic Act and (2) that Act's inducement of responsible corporate self-policing on which the protection of the public in this field so largely depends.

2. Respondent testified in his own defense that he had employed a system in which he relied upon his subordinates to handle sanitation problems, for which he acknowledged ultimate responsibility. On cross-examination, the government showed that twenty months before discovery of the unsanitary conditions alleged to exist at Acme's Baltimore warehouse, FDA

[7] Although the court of appeals has remanded the instant case for retrial under its new standard, there is no assurance that adverse decisions of lower courts applying that standard will be appealable by the government. If the government fails to present proof of "wrongful conduct," the trial court may grant a motion for acquittal. Under the double jeopardy clause, such a judgment might not be appealable by the government. See *United States* v. *Ball*, 163 U.S. 662, 671; *Fong Foo* v. *United States*, 369 U.S. 141; *United States* v. *Sisson*, 399 U.S. 267. But see *United States* v. *Jenkins*, No. 73-1513, certiorari granted, May 28, 1974.

had given respondent notice of unsanitary conditions in the firm's warehouse at Philadelphia. This testimony tended to show that respondent was on notice that he could not rely upon his system of delegation to subordinates to prevent unsanitary conditions in the firm's warehouses, that he was aware of the deficiencies of this system before the Baltimore violations were discovered, and that he had the responsibility and power to take steps to insure that it worked in compliance with the Act. Cf. *United States* v. *Ross,* 321 F. 2d 61, 67 (C.A. 2), certiorari denied, 375 U.S. 894; *United States* v. *Kaufman,* 453 F. 2d 306, 310–311 (C.A. 2).

The panel majority viewed this evidence as if it were evidence of an unprosecuted prior crime, the admissibility of which depended on a balancing of prejudice to the defendant against the needs of justice. See *United States* v. *Woods, supra,* 484 F. 2d at 134–135. The court found that the evidence was prejudicial and that no need for it had been shown under the theory on which this case was tried. The evidence demonstrated, however, both respondent's awareness of prior sanitation deficiencies in Acme's warehouse sanitation system, and his admitted responsibility for correcting them, thus tending to rebut his defense that he had justifiably relied upon subordinates to handle sanitation matters. This evidence was therefore directly relevant to the jury's determina-

tion of whether respondent shared the responsibility for the conditions in issue.[8]

Under the standard adopted by the court of appeals here, corporate officials would be encouraged to avoid the active supervision necessary to protect the public from adulterated food and drugs. As construed in *Dotterweich,* however, the Act was intended to prevent top officials from seeking refuge behind delegations of responsibility and restrictions on the reporting upward of information that might trigger accountability.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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AUGUST 1974.

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[8] Such evidence may be considered under *United States* v. *Calderon*, 348 U.S. 160, which held that "reviewing courts * * * can seek corroborative evidence in the proof of both parties where, as in this case, the defendant introduces evidence in his own behalf after his motion for acquittal has been overruled." *Id.* at 164. See also *id.* at 164, n. 1.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-1953

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN R. PARK, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE, JOSEPH H. YOUNG, DISTRICT JUDGE.

Argued November 7, 1973—Decided July 2, 1974

Before BOREMAN, Senior Circuit Judge, and CRAVEN and FIELD, Circuit Judges

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Gregory M. Harvey (*J. Cookman Boyd, Jr., Rob Ross Hendrickson* on brief) for Appellant; *Leonard M. Linton, Jr.*, Assistant United States Attorney, (*George Beall*, United States Attorney, on brief) for Appellee.

BOREMAN, Senior Circuit Judge:

John R. Park, President of Acme Markets, Inc. (hereafter Acme), was tried and convicted by a jury of violating 21 U.S.C. § 331(k)—causing the adultera-

tion of food which had traveled in interstate commerce and which was held for sale.[1] The evidence is undisputed that an inspector of the Food and Drug Administration (F.D.A.) made an inspection of Acme's Baltimore warehouse in November and December of 1971 and again in March of 1972. On both of these occasions the inspector found evidence of rodent infestation of food stored in the warehouse. As a result of these inspections an informal hearing was held in June 1972 at the F.D.A.'s Baltimore office. Although Park was not present, he was invited to attend the hearing and was represented by Robert W. McCahan, Baltimore Divisional Vice President of Acme.

In March of 1973, a five-count information was filed charging Acme *and* Park with the offenses cited above; four counts stemmed from the 1971 inspection and the fifth count from the 1972 inspection. Prior to trial Acme pleaded guilty to all counts. Park was tried on the theory that he "was a corporate officer who, under law, bore a relationship to the receipt and storage of food which would subject him to criminal liability under *United States* v. *Dotterweich,* 320 U.S. 277 (1943)." The jury found Park guilty on all counts and he was fined a total of $250.[2]

[1] 21 U.S.C. § 331 provides, in part: "The following acts and the causing thereof are prohibited:

* * * * *

"(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

[2] Park stated that a controlling factor in his decision to appeal this conviction was the fact that a second conviction under 21 U.S.C. § 331 is a felony, punishable by a term of

Park appeals his conviction alleging (1) the court erred in its instructions to the jury and (2) prejudicial evidence of warnings of alleged prior violations of the Act was improperly admitted.

The court charged the jury that the sole question was "whether the Defendant held a position of authority and responsibility in the business of Acme Markets"; that Park could be found guilty "even if he did not consciously do wrong" and even though he had not "personally participated in the situation" if it were proved beyond a reasonable doubt that Park "had a responsible relation to the situation." We conclude that this charge does not correctly state the law of the case, that the conviction of Park on all counts must be reversed and a new trial awarded.

The Government asserts that this case is controlled by the decision of the Supreme Court in *United States* v. *Dotterweich*, 320 U.S. 277 (1943),[3] and contends

imprisonment up to three years. Although violations of food and drug laws are punishable without regard to proof of scienter, the Supreme Court has indicated that it is an open question whether, in the absence of proof of scienter, an accused could be *incarcerated* for violating a "regulatory" statute. *Morissette* v. *United States*, 342 U.S. 246 (1952); *see also United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 564 (1971). We note that due process standards with respect to the loss of liberty appear to be higher than those with respect to loss of property. *Cf. Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). We, too, consider this to be an open question and intimate no opinion on it.

[3] As *Dotterweich* was postured when it reached the Supreme Court the primary question was whether "only the corporation was the 'person' subject to prosecution" under the Act. Therefore, the Supreme Court's opinion reveals very little about the factual setting in that case. Mr. Dotterweich was President and General Manager of Buffalo Pharmacal Company, Inc. The company was small, employing only twenty-six employees, all of whom worked on one upper floor of the building. Mr. Dotter-

that *Dotterweich* specifically held that the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. §§ 301–392, "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing." 320 U.S. at 281. From this the Government argues that the conviction may be predicated solely upon a showing that the defendant, Park, was the President of the offending corporation. The error here is that the Government has confused the element of "awareness of wrongdoing" with the element of "wrongful action";[4] *Dotterweich* dispenses with the need to prove the first of those elements but not the second.

As a general proposition, some act of commission or omission is an essential element of every crime. For an accused individual to be convicted it must be proved that he was in some way personally responsible for the act constituting the crime. The Supreme Court recognized this in *Dotterweich*: "The offense is committed * * * by all who do have such a responsible

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weich was responsible for "general overseeing" of the Company operations; he was the direct supervisor of all employees. The trial transcript establishes that Mr. Dotterweich personally made every executive decision and had direct personal supervisory responsibility over the physical acts which resulted in the interstate shipment of misbranded and adulterated drugs. In the instant case Park is the chief executive officer of Acme, a multistate corporation giant. *See* note 5, *infra*. It is clear that his supervisory responsibility over most of the employees is indirect. There is no allegation or proof that Park was responsible for the executive decisions which resulted in contamination of the food. The facts of *Dotterweich* established the personal responsibility which we find lacking in the case before us.

[4] The Federal Food, Drug, and Cosmetic Act § 331(k) prohibits "causing" the adulteration of food which has traveled in interstate commerce and is held for sale. We would define "wrongful action" in this context as acts of the accused which *cause* the adulteration of such food.

share in the furtherance of the transaction which the statute outlaws * * *" 320 U.S. at 284. The criminal acts which were the subject of Acme's conviction cannot be charged to Park without proof that he participated directly or constructively therein or that the acts were done to further some criminal conspiracy in which he took part.[5] To use the language of *Dotterweich,* "under § 301 [21 U.S.C. § 331] a corporation may commit an offense and all persons who *aid and abet* its commission are equally guilty." 320 U.S. 284 (emphasis added). It is the defendant's relation to the criminal acts, not merely his relation to the corporation, which the jury must consider; 21 U.S.C. § 331 is concerned with criminal conduct and not proprietary relationships.

In sum, the court told the jury that Park would be guilty if it were shown that he "had a position of authority and responsibility in the situation out of which these charges arose." This instruction, taken in combination with the other parts of the charge related above, might well have left the jury with the erroneous impression that Park could be found guilty in the absence of "wrongful action" on his part.

Upon a subsequent trial the jury should be instructed that a finding of guilt must be predicated

[5] Acme maintained its principal corporate offices and headquarters in Philadelphia, Pennsylvania. As president, Park also maintained principal executive offices there. As Acme's president and chief executive officer, Park was theoretically in charge of approximately 36,000 employees in 874 retail outlets, 12 main warehouses and 4 special warehouses located on the east and west coasts of the United States. To hold Park *criminally* liable for the wrongful actions of each and every one of these employees by merely showing his position with the corporation is manifestly unjust, unfair and beyond the realm of reasonableness.

upon some wrongful action by Park. That action may be gross negligence and inattention in discharging his corporate duties and obligations or any of a host of other acts of commission or omission which would "cause"[6] the contamination of the food.[7] "Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance." *Dotterweich, supra,* 320 U.S. at 284.

It is argued by the prosecution that the requirement of such proof will make enforcement more difficult. Nevertheless, the requirements of due process are intended to favor fairness and justice over ease of enforcement. We perceive nothing harsh about requiring proof of personal wrongdoing before sanctioning the imposition of criminal penalties.

We find another ground for reversal of Park's conviction. He contends that the admission in evidence of a warning by F.D.A. as to conditions alleged to have existed in 1970 in Acme's Philadelphia warehouse was prejudicial error requiring reversal. There was no evidence of prosecution of either Acme or Park following F.D.A.'s warning. In the recent case of *United States* v. *Woods*, 484 F. 2d 127 (4 Cir. 1973), this court examined in detail the admissibility of evidence relating to prior alleged offenses *not the subject*

[6] See note 4, *supra*.

[7] It would appear that the question of causation will be a principal issue upon a retrial. The question of causation is to be distinguished from that of intent. *United States* v. *Sheridan*, 329 U.S. 379 (1946). Some guidance with respect to the question of causation can be found in cases construing "aid and abet" which phrase appears in *United States* v. *Dotterweich*, 320 U.S. 277, 284 (1943). *See also United States* v. *Peoni*, 100 F. 2d 401 (2 Cir. 1938).

of conviction and we will not attempt to elaborate here.[8]

The *Woods* majority adopted a modern and liberal approach concerning the admissibility of such evidence. This court refused to decide the issue by "pigeonholing" the evidence under one of a number of recognized exceptions to the general rule that such evidence is inadmissible. Opting for a more flexible balancing test the court cited McCormick on Evidence § 190, p. 453 (Cleary Ed. 1972).

> "[T]he problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual *need* for the other crimes evidence *in the light of the issues* and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility." *United States* v. *Woods*, 484 F. 2d 127, 134 (4 Cir. 1973) (emphasis added).

In determining the admissibility of "prior crimes" evidence the *Woods* majority balanced the relevancy, persuasiveness and *need* for such evidence against the prejudice resulting to the defendant because of its admission. In a dissenting opinion in *Woods* Judge Widener favored the application of a traditional and

[8] In the case of *United States* v. *Woods*, *supra*, the defendant was convicted of first-degree murder of an eight-month-old infant. At trial evidence that other children in defendant's care had died or suffered respiratory difficulties was admitted to prove the commission of the crime charged. On appeal this court held that the evidence was admissible in general and also admissible to prove corpus delicti. Although *Woods* was decided in a completely different factual setting, the legal principles enunciated therein are clearly applicable to the present case.

less liberal balancing test.[9] Regardless of the balancing test applied, we are convinced that the evidence concerning the Philadelphia incident was inadmissible under the theory on which the case was tried.

Initially we conclude that there was no actual need for the Philadelphia evidence. In his jury charge the district judge stated that:

> "[Y]ou need not concern yourselves with the first two elements of the case. The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets."

Thus, as this case was submitted to the jury and in light of the sole issue presented, *need* for the Philadelphia evidence is not apparent. Absent a showing of such need we are of the opinion that, even under the liberal balancing test of *Woods,* the prejudicial effect of this evidence outweighed any possible relevancy or persuasiveness it might have had.[10]

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[9] "In applying a balancing test, the considerations confronting the district court may be summarized succinctly: assuming an exception to the rule is applicable, before admitting evidence of prior acts or crimes, the court should determine, first, whether the evidence is relevant; secondly, whether the evidence is unduly prejudicial notwithstanding its relevancy; and, thirdly, having met both prior tests, whether the evidence is truly needed by the prosecution." *United States* v. *Woods*, 484 F. 2d 127, 141 (4 Cir. 1973) (Widener, J., dissenting opinion).

[10] Such a conclusion is consistent with the result reached in *Woods*. Throughout the opinion in *Woods* the court emphasized the overriding *need* for "prior crimes" evidence because of the particular and peculiar nature of infanticide cases. "Indeed, the evidence is so persuasive and *so necessary* in case of infanticide * * * if the wrongdoer is to be apprehended, that we think that its relevance clearly outweighs its prejudicial effect on the jury." *United States* v. *Woods*, 484 F. 2d 127, 135 (4 Cir. 1973) (emphasis added).

We note in passing, without deciding, that in light of our comments above evidence of "prior crimes" might become sufficiently necessary and relevant to warrant its admission on retrial. Our conclusion that the prosecution must show some wrongful act by the accused may effect the result of the balancing test as prescribed in *Woods* by increasing the *need* for "prior crimes" evidence. Whether the need for and the persuasiveness and relevance of such evidence may outweight its prejudicial effect will, in large part, depend on the prosecution's new approach to the presentation of its case. Thus, on retrial, it will be incumbent upon the district court to determine the admissibility of this "prior crime" evidence in light of developments.

Reversed and remanded for a new trial.

CRAVEN, Circuit Judge, dissenting:

I would affirm because I believe this case is controlled by *United States* v. *Dotterweich*, 320 U.S. 277 (1943). To express my viewpoint, it is enough to quote from Mr. Justice Frankfurther writing for the Court in *Dotterweich*:

> The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. . . . The prosecution to which Dotterweich was subjected is based on a now familiar

> type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. * * *. And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded [or adulterated], and that the article may be misbranded [or adulterated] without any conscious fraud at all * * *."

Id. at 280–81 (citations omitted).

In *Dotterweich* the Supreme Court reversed a Second Circuit decision that was said to be motivated by "fear that an enforcement of § 301(a) as written might operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment." 320 U.S. at 284. But defendant Park was not just "remotely entangled" in the proscribed adulteration. Like Dotterweich, he was president of the corporation with full power to control its operations and to take measures to prevent rat infestation of food. Although he had delegated the day-to-day supervision of sanitation to subordinates, Park retained both the power and responsibility to see that the system of rodent control was effective, and if it didn't work, to change it.

As Mr. Justice Frankfurter said about Dotterweich:

> "The offense is committed * * * by all who * * * have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs [or food]. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing

> be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

Id. at 284–85.

The trial judge made it perfectly clear to the jury that "the fact that the Defendant is present and is a chief executive officer of the Acme Markets does not require a finding of guilt. Though, he need not have personally participated in the situation, he must have had a responsible relationship to the issue. The issue is, in this case, whether the defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose."

Thus, again in the language of Mr. Justice Frankfurter, "the District Court properly left the question of the responsibility of [Park] for the shipment to the jury, and there was sufficient evidence to support its verdict." 320 U.S. at 285.

Moreover it is clear from examining the prosecutor's argument to the jury that there was no effort to equate the presidency of the corporation with the responsibility. Instead, the government argued that Mr. Park was responsible because he had established a system of rodent control that did not work in March 1970, November 1971 and March 1972 and that even so he made no effort to change or improve the system.[11]

[11] Park's testimony indicated the system was established before he became president, but he conceded that if it didn't work, and needed changing, it was his responsibility to change it. In addition, Park acknowledged having received a letter from the FDA in 1970 outlining unsanitary conditions an inspection team had found in the Philadelphia warehouse.

The government's contention was not that the jury should convict if they found that Mr. Park was president (that was undisputed) but that they should convict if they found it to be his responsibility for setting up a system of sanitation and of delegating responsibility in a way that does the job in a sanitary way.

I am sympathetic with my brothers' sense of justice that prompts them, it seems to me, to write into the statute some small degree of mens rea or scienter as a prerequisite to liability, but I share the government's fear that today's decision will undermine the congressional purpose of protecting "the innocent public who are wholly helpless" to protect themselves from contaminated food.

Because there will be a new trial, I want to align myself with the majority's suggestion that evidence in the nature of "prior offenses" may be admissible. Indeed, I would go further. If an additional burden of proof is to be put upon the government to show that Mr. Park acted wrongfully, then it would seem to me that evidence would clearly be admissible that Park's system of rodent control did not work in March 1970 in Philadelphia, or in November 1971 or March 1972 in Baltimore. If the rule is otherwise, I think the government cannot possibly sustain its new burden.

APPENDIX B

JUDGMENT

United States Court of Appeals for the Fourth Circuit

No. 73-1953

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN R. PARK, APPELLANT

Appeal from the United States District Court for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the District of Maryland, at Baltimore, for a new trial, consistent with the opinion of the Court filed herewith.

WILLIAM K. SLATE, II,
Clerk.

A True Copy, Teste:

WILLIAM K. SLATE, II,
Clerk,
By WILMA UPSHUR, *Deputy Clerk.*

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